



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 84 OF 2015**

**ELIJAH MBATHA.....PLAINTIFF**

**VERSUS**

**MADIVEST COMPANY LIMITED.....DEFENDANT**

**JUDGEMENT**

**Introduction**

1. In the Plaintiff dated 11<sup>th</sup> March, 2015, the Plaintiff is seeking for a declaration that the Defendant does not have a purchaser's interest, or any other interest or claim, over parcel of land known as Donyo Sabuk/Komarock Block 1/135(the suit land); an order that a caution placed on the suit land be removed and a mandatory injunction to issue barring the Defendant from placing any caution on the suit land. The Plaintiff filed an amended Plaintiff on 2<sup>nd</sup> June, 2017. The Plaintiff has averred in the Plaintiff that vide a sale agreement dated 19<sup>th</sup> May, 2014, he agreed to sell to the Defendant the suit land for Kshs.27,650,000/-; that the Defendant was required to pay a deposit of Kshs.1,000,000/- with the balance of Kshs.26,650,000/- to be paid upon registration of the transfer in its favour, and in any event within 90 days, and that by the 19<sup>th</sup> August, 2014, being the completion date, the Defendant had failed to secure a professional undertaking towards the payment of the balance of the purchase price.

2. The Plaintiff finally averred that he terminated the Agreement of Sale vide his advocates letter of 29<sup>th</sup> September, 2014 and that he has sold the suit land to Jamii Housing Co-operative Society Limited vide an agreement dated 15<sup>th</sup> December, 2014.

3. In its Defence and Counter-claim, the Defendant averred that the Plaintiff extended time for completion, accepted completion documents and a professional undertaking from the financier's advocates; that the purported termination was done due to the fact that the plaintiff had gotten a higher bidder for the suit property and that the agreement between it and the Plaintiff remains valid.

4. In the counter-claim, the Defendant averred that the Plaintiff has breached the contract and acted fraudulently; that an order of specific performance should issue to compel the plaintiff to transfer the suit land to the Defendant and that in the alternative, the plaintiff to pay to the Defendant Kshs.3,535,200/- with interest of 30% from the date of the agreement with Aggravated and Exemplary damages on the interest being charged on the property known as Kjd/Olchore Onyore/13420.

**The Plaintiff's Case**

5. The Plaintiff, Pw 1, informed the court that as at the time of filing the current suit, he was the registered proprietor of a parcel of land known as Donyo/Sabuk/Komarock 1/135(the suit land); that he entered into an agreement of sale with the Defendant in respect to the suit land and that he believed that the transaction would be completed within a period of ninety (90) days.

6. It was the evidence of Pw 1 that the Defendant paid him a deposit of Kshs.2,000,000/- and that he obtained the consent of the Land Control Board for the transfer of the suit land to the Defendant. Pw 1 stated that the completion period lapsed before obtaining a professional undertaking from the Defendant's advocates; that vide a letter dated 10<sup>th</sup> September, 2014 he extended the completion period by fifteen (15) days and that he terminated the agreement vide his advocate's letter dated 29<sup>th</sup> September, 2014.

7. Pw 1 stated that although he subsequently agreed to further extend the completion period, his wife (deceased) refused to execute the spousal consent and that he proceeded to sell the suit land to Jamii Housing Co-operative Society. The Plaintiff asked the court to grant to him the following prayers: forfeiture of 10% of the purchase price as per the Law Society (1989) Conditions of Sale and 10% of the purchase price as liquidated damages and for damages. The Plaintiff produced in evidence the Sale Agreement of 19<sup>th</sup> May, 2014 and the numerous letters that were exchanged between the parties.

8. In cross-examination, Pw 1 stated that although he signed the variation of agreement, his wife declined to sign it.

## The Defendant's Case

9. The Defendant's Director, Pw 1, informed the court that the Defendant entered into an agreement of sale of the suit land with the Plaintiff; that the completion period was 90 days; that he paid to the Plaintiff a deposit Kshs.2,000,000/- and that the balance of the purchase price was to be financed by the bank, which finance was to be secured by another parcel of land known as KJD/OLCHORE ONYORE/13420.

10. According to Dw 1, the Plaintiff agreed to extend the completion period and that on 10<sup>th</sup> October, 2014, the Defendant forwarded to the Plaintiff's advocate a cheque being the agreed penalty together with a variation agreement dated 3<sup>rd</sup> October, 2014.

11. Dw 1 informed, the court that the Defendant's Financier's advocate gave the Plaintiff's advocate an undertaking in respect of the balance of the purchase price vide a letter dated 6<sup>th</sup> October, 2014; that on 22<sup>nd</sup> October, 2014, the Plaintiff's advocate informed the Defendant's advocate that he had rescinded the Agreement for Sale on the ground that "*Mrs Kithimba has refused to give consent to the transaction*" and that the Defendant is still willing to complete the transaction. The Defendants Director produced a bundle of documents in evidence to support his case.

## Submissions

12. The Defendant's advocate submitted that the Plaintiff failed to inform the Defendant in writing of the breaches of the agreement that it had committed; that the Plaintiff's spouse consented to the sale of the suit land when she appeared before the Land Control Board and that the purported rescission of the Sale Agreement by the Plaintiff was null and void. The Plaintiff's advocate's submissions were not on record.

## Analysis and Findings

13. It is not in dispute that the Plaintiff entered into an Agreement of Sale of land known as Donyo Sabuk/Koma Rock Block 1/135 measuring 8.95Ha for Kshs.27,650,000. Although the Agreement stated that the deposit of Kshs.1, 000,000/- had been paid to the Plaintiff, the Plaintiff acknowledged that he was paid a deposit of Kshs.2,000,000/-.

14. Clause 4 of the Sale Agreement provided that the balance of the purchase price was to be paid upon registration of the transfer in favour of the purchaser and a charge in favour of the Financier: According to clause 5, the completion period was to be ninety(90) days from the date of executing the Agreement(19<sup>th</sup> August, 2014).

15. Clause 6 provide that the vendor advocates shall, upon receipt of a professional undertaking to pay the balance of the purchase price, within 14 days from the date of the transfer and charge, release the completion documents. The Agreement further provided that the Law Society Conditions of Sale (1989) will be applicable and time was to be of the essence in respect to the Agreement.

16. The Agreement further provided at clause 13(B) that termination of the Agreement will be in writing specifying the breach or failure and allowing the other party a period of not less than fifteen (15) days to rectify the breach. Where the other party fails to remedy the breach, the sale stood rescinded after the expiry of the period stipulated in the notice.

17. If the breach of the Sale Agreement is by the Vendor(the Plaintiff), then the purchaser was entitled to a refund of the entire deposit together with interest calculated at the rate of 30% per annum recoverable on the date of the termination until payment in full. However, if it is the purchaser (the Defendant) who is in breach of the agreement, then he was to forfeit 10% of the purchase price.

18. The evidence before me shows that by the end of the completion period of 90 days, the Defendant had not met its obligations. Consequently, on 28<sup>th</sup> August, 2014, the Plaintiff's advocate informed the Defendant's advocate that his client was willing to have the completion date extended. The Plaintiff's advocate authored another letter dated 10<sup>th</sup> September, 2014 and informed the Defendant's advocate that he had instructions to extend the "*Notice*" period by a further fifteen(15) days to enable him obtain an undertaking from the Defendant's financier.

19. Vide a letter dated 25<sup>th</sup> September, 2014(the 15<sup>th</sup> day), the Defendant's advocate inquired from the Plaintiff's advocate "*the terms of the professional undertaking*" they wished to be given by the bank's advocate. This letter, in my view was mischievous considering that the Agreement of Sale was clear on the terms of the professional undertaking that was to be given by either the Defendant's advocate or the advocates acting for the Financier – that is, an undertaking to pay the balance of the purchase upon receipt of the completion documents and registration of the transfer and charge.

20. It would appear that by the time the Plaintiff's advocate wrote the letter dated 29<sup>th</sup> September, 2014, they had not received the Defendant's letter dated 25<sup>th</sup> September, 2014. In that letter, the Plaintiff's advocates informed the Defendant's advocates that pursuant to their letter of 10<sup>th</sup> September, 2014 and the non observance of the Sale Agreement, the agreement had terminated and the deposit paid forfeited.

21. From the documents produced by the Plaintiff, it was not until 30<sup>th</sup> September, 2014 that the Defendant's advocates forwarded to the Plaintiffs the letter of undertaking by the firm of Miller & Company Advocates, who were acting for Co-operative Bank of Kenya Limited, the financier. In that letter, the bank's advocate called for the completion documents. The letter by the firm of Miller and Co. advocates is dated 26<sup>th</sup> September, 2014.

22. When the Plaintiff's advocates received the letter of undertaking from the Defendants' advocates, they informed the Defendants' advocates, vide their letter dated 3<sup>rd</sup> October, 2014, that "the Vendor(the Plaintiff) had agreed to re-validate the Sale Agreement subject to

the purchaser paying a penalty of Kshs.250,000/- for the delay. A Deed of Variation was attached on the said letter for execution by the Defendant.

23. Instead of sending back the signed Deed of Variation, the Plaintiff's advocate informed the Defendant's advocate vide a letter dated 22<sup>nd</sup> October, 2014 that the Plaintiff's wife had refused to give consent to the transaction. The Plaintiff returned to the Defendant's advocate the original banker's cheque for Kshs.250,000/- together with the un-executed Variation of Agreement.

24. The documents produced by the Defendant shows that its financier had charged a parcel of land known as Kjd/Olchore Onyore/13420 as a condition precedent to financing the transaction between the Plaintiff and the Defendant.

25. From the above narration of what transpired, the only issue that I am supposed to deal with is who between the Plaintiff and the Defendant is in breach of the Agreement of Sale of 19<sup>th</sup> May, 2014 and the payable damages, if any.

26. As I have stated above, the Agreement of Sale between the Plaintiff and the Defendant was to be completed within 90 days, which was on 19<sup>th</sup> August, 2014. The Agreement of Sale provided that "*time shall be of the essence*". Where a contract states that "*time is of the essence*", it means that performance of the contract by one party at or within the period specified in the contract is necessary to enable that party to require performance by the other party. Failure to act within the time required constitutes a breach of the contract.

27. In the case of *Njamunya vs Nyaga(1983) KLR 282*, the **Court of Appeal** held that where it is not stipulated in the contract that time is of essence, the notice must be given to the defaulting party and that notice is what will make time to be of essence. It therefore follows that unless the Agreement provides otherwise, where the Agreement provides that "*time is of essence*", a notice need not be given where the agreement has lapsed by effluxion of time for it to be rescinded or terminated. The Law Society Conditions pertaining to termination of such an agreement do not apply in such a situation.

28. The Agreement of Sale between the Plaintiff and the Defendant provided that termination shall be notice in writing to the other party specifying the breach and allowing the other party a period of not less than fifteen(15) days to rectify the breach, whereafter the sale would stand rescinded. The Plaintiff's advocates served on the Defendant's advocate with a termination notice on 28<sup>th</sup> August, 2014. By this time, the Defendant's advocate had not given to the Plaintiff a professional undertaking on the balance of the purchase price; Indeed, the default by the Defendant in procuring a professional undertaking within 90 days was confirmed by his advocate in the letter dated 20<sup>th</sup> September, 2014 where he stated as follows:

***"We have sought a professional undertaking from the bank's advocate and we expect the same within the next few days....."***

29. On 10<sup>th</sup> September, 2014, the Plaintiff's advocate informed the Defendant's advocate that they had extended the notice period by a further fifteen (15) days from the date of the letter. On 25<sup>th</sup> September, 2014, the Plaintiff's advocate informed the Defendant's advocate that "*the agreement is (sic) terminated as per the terms of the Agreement and the amount paid forfeited*".

30. It is therefore obvious that by the time the Defendant's advocate was forwarding the letter from the bank's advocates giving their professional undertaking, the Sale Agreement between the Defendant and the Plaintiff stood rescinded.

31. Although the Plaintiff's advocate informed the Defendant's advocate vide a letter dated 3<sup>rd</sup> October, 2014 that the Plaintiff had agreed to re-validate the Sale Agreement, the Plaintiff never signed the Deed of Variation; Consequently, the Agreement of Sale which had been rescinded vide the letter dated 29<sup>th</sup> September, 2014 was never revived or re-validated by the Plaintiff.

32. On the basis of the documents produced in this court, I find that the Plaintiff lawfully terminated the Agreement of Sale dated 19<sup>th</sup> May, 2014. It is the Defendant who was in breach of the Agreement by failing to give to the Plaintiff or his advocates a professional undertaking for the release of the purchase price within the stipulated time frame.

33. Clause 13 (D) of the Agreement provided that upon termination of the Agreement by the Vendor(Plaintiff) due to the breach on the part of the purchaser, the purchaser shall forfeit a sum equivalent to 10% of the purchase price paid by the purchaser by way of liquidated damages. The purchase price was Kshs.27,650,000. 10% of Kshs.27,650,000/- is Kshs.2,650,000/-. That is the amount that the Defendant ought to forfeit under the Agreement of Sale of 19<sup>th</sup> May, 2014.

34. For those reasons, I find that the Plaintiff has proved his case on a balance of probabilities. On the other hand, the Defendant has failed to prove its counter-claim. Consequently, I allow the amended Plaint dated 2<sup>nd</sup> June, 2017 as follows:

***a. The Defendant to forfeit to the Plaintiff Kshs.2,675,000 being the 10% of the purchase price. Having been paid Kshs.2,000,000/-, the Plaintiff to be paid the balance of Kshs.675,000/- .***

***b. The Defendant to pay the costs of the suit and the Counter-claim.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY, 2018.**

**O.A. ANGOTE**

**JUDGE**